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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/530,290	06/14/2005	Thomas L. Haschen	4845-0101PUS2	3643
2292	7590	08/23/2007	EXAMINER	
BIRCH STEWART KOLASCH & BIRCH			MAHAFKEY, KELLY J	
PO BOX 747			ART UNIT	PAPER NUMBER
FALLS CHURCH, VA 22040-0747			1761	
			NOTIFICATION DATE	DELIVERY MODE
			08/23/2007	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

mailroom@bskb.com

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/530,290

Applicant(s)

HASCHEN ET AL.

Examiner

Kelly Mahafkey

Art Unit

1761

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 03 August 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 06 August 2007. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheeey. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 84-122.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

Cont. 3: The proposed amendments raise new issues that would require further search and/or consideration and thus will not be entered. For example, limitations of claim 96 have been deleted, further broadening the claim. Claim 96 previously required that the "bypass protein (RUP/IUP) level of the end product is increased to between one and one-fourth times and approximately two and one-half times the original level of the byproduct nutrient source mixture, wherein the RUP/IUP in the end product is from about 50% up to about 83% of the crude protein level". The proposed amendments only require that the end product RUP level is increased a certain number of times. The proposed amendments do not require the total RUP content in the end product be 50-83%.

Cont. 11: Applicant's comments filed August 3, 2007, regarding the 112 rejections, have been considered but are not deemed persuasive. Applicant arguments are based on amendments which have not been entered (See #3 above) and on arguments which have been addressed in the office action mailed April 5, 2006.

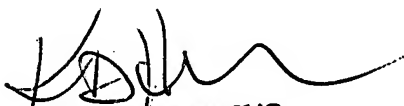
Specifically regarding the 112 1st paragraph rejection, it is again noted that although applicant has support for the increase in the nutritional properties of the "byproduct nutrient source mixture" applicant does not have support for the increase in the nutritional properties of the "end product" as recited in claims 96, 106, 110, 116, and 122.

Additionally, regarding the 112 2nd paragraph rejection, applicant argues that the term "an empirical relationship" is definite, applicant is referred to the previous office action and reminded that the phrase "an empirical relationship" does not clearly relate to the specific empirical relationship taught in applicant's specification or recited in applicant's claims.

Additionally regarding the 112 2nd paragraph rejection, applicant argues that the 112 rejection of claims 87, 89, 90, 96, 106, 110, 116, and 122 is not proper as the essential method steps are included in the claimed invention. This argument is not convincing as applicant's claims recite increased nutritional levels of a product but do not recite or refer to an active step which achieves the nutritional increase in the product. Thus, it is unclear as to if the method step in which the nutritional values are increased is present in the instant claims themselves or within the claims they depend on, or if the necessary method step has been omitted.

Applicant's comments filed August 3, 2007, regarding the 103(a) rejections, have been considered but are not deemed persuasive. Applicant's comments are based on arguments, which have been addressed in the office action mailed April 5, 2006.

Thus the rejections are maintained for the reasons of record, as set forth in the Final Office action.



KEITH HENDRICKS
PRIMARY EXAMINER

